Nos. 05-5723-ag, 05-6624-ag

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LONG ISLAND HEAD START CHILD DEVELOPMENT SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Long Island Head Start Child Development Services, Inc. ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's

Decision and Order, which issued on September 29, 2005, and is reported at 345 NLRB No. 74. (JA 1-5.)¹

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. That order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. §160(e) and (f)). This Court has jurisdiction over the case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Patchogue, New York. The Company's petition for review and the Board's cross-application for enforcement were timely filed; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the employees' health insurance benefits without giving the Union an opportunity to bargain over the change.

¹ "A" references are to the joint appendix. References preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

This case came before the Board on a consolidated complaint issued by the Board's General Counsel pursuant to charges filed by District Counsel 1707, Local 95, American Federation of State, County and Municipal Employees, AFL-CIO ("the Union"). (JA 65, 73-76.) Following a hearing, an administrative law judge issued a decision and recommended order finding that the Company had violated Section 8(a)(5) and (1) of the Act. The Company filed exceptions to the judge's decision. (JA 212-34.) The Board issued a Decision and Order affirming the judge's rulings, findings, and conclusions with minor modifications. (JA 204-06.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company Provides Employees with Health Insurance Benefits through the Vytra Health Plan; the Parties Enter into a Collective-Bargaining Agreement in 1998, and Allow It To Automatically Renew Annually through May 4, 2004; the Employees' Health Insurance Benefits Remain Unchanged

The Company, which provides pre-school and social services in Patchogue, New York, employs a unit of teachers, teacher aides, and related service specialists and employees represented by the Union. (JA 204; 8.) Since 1995, the Company has provided its employees with health insurance benefits through the Vytra Health Plan. (JA 201; 59.)

On May 4, 1998, the Company and the Union entered into a collective-bargaining agreement effective by its terms through May 4, 2001. Although the agreement did not specifically refer to the existing health insurance benefits, it stated that "all current practices, policies and procedures" in the Company's Personnel Policies and Procedures Manual would remain in effect. The Manual, in turn, stated that employees were eligible for company-sponsored benefits. (JA 115, 154.) Further, although Section 450 of the Manual also reserved the Company's right "in its sole discretion" to modify or terminate benefits without the Union's consent, the Company did not exercise that right during the life of the agreement. Instead, the employees' health insurance benefits remained unchanged during the life of the agreement. (JA 204; 45).

Article 35 of the agreement contained an automatic renewal clause providing that the agreement "shall automatically renew itself and continue in full force and effect from year to year unless written notice of election to terminate or modify any provision of this Agreement is given by one party, and received by the other party not later than 60 days prior to the expiration date of this Agreement or any extension thereof." (JA 157.) After the agreement expired in 2001, the parties allowed it to renew automatically from year to year through May 4, 2004. During this time, the Company continued to provide employees with health insurance benefits under the Vytra Health Plan. (JA 201; 59.)

B. The Parties Begin Negotiations for a Successor Agreement; the Existing Agreement Expires by Its Terms on May 4, 2004

On October 1, 2003, instead of deciding to allow the contract to automatically renew once again, the parties began negotiations for a new agreement to succeed the renewal agreement that was due to expire on May 4, 2004. Having begun their negotiations, the parties did not provide written notice of their intent to terminate or modify the agreement. Between October 2003 and April 2004, they held at least six negotiating sessions. Although the parties did not reach agreement on a new contract, on April 22, 2004, they entered into a Memorandum of Agreement that retroactively modified certain terms of the existing and past agreements. The Memorandum, however, stated on its face that it was effective only through May 4, 2004, the same day the renewal agreement was due to expire. (JA 204; 159-61, 187.) Once the renewal agreement expired, however, the Company continued to have an obligation to provide employees with existing benefits, including the Vytra Health Plan. (JA 204; 24-25.)

C. The Company Unilaterally Changes the Employees' Health Insurance Benefits

In the meantime, in March 2004, while the parties were still engaged in bargaining for a successor agreement, Anne Marie Lunetta, who had participated in bargaining as union representative, learned that the Company was planning to change the employees' health insurance benefits. (JA 204; 27-28.) On March 25,

Lunetta sent a letter to the Company demanding bargaining over the proposed change. (JA 204; 191.) The Company did not reply to the letter. (JA 203; 30.)

On June 1, the Company unilaterally changed the employees' health insurance benefits to United Healthcare, without giving the Union an opportunity to bargain over the change. (JA 204; 159-61.) In making the change, the Company cited the parties' expired collective-bargaining agreement, which had stated that the Personnel, Policies and Procedures Manual "shall remain in effect," and Section 450 of the Manual, which the agreement had incorporated by reference. Section 450 of the Manual had noted management's right "in its sole discretion to modify or terminate any or all benefit plan . . . without consent of the union" (JA 115.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista and Members Liebman and Schaumber) found, in agreement with the administrative law judge, that the Employer violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing the employees' health insurance benefits without giving the Union an opportunity to bargain over the change.

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

Affirmatively, the Board's order requires the Company to bargain with the Union on request before implementing any changes in wages, hours, or other terms and conditions of employment; on the Union's request, to reinstate the health insurance benefits that existed prior to June 1, 2004, and to make the unit employees whole for any losses they might have suffered as a result of the unilateral change. The Board's order also requires the Company to post a remedial notice. (JA 205-206.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158 (a)(5) and (1)) by changing the employees' health insurance benefits without first giving the Union an opportunity to bargain over the change.

The Company does not dispute making the unilateral change on June 1, 2004. Instead, it contends that a management rights clause that was incorporated by reference in the parties' last collective-bargaining agreement privileged its unilateral action. The problem for the Company, however, is that the agreement was effective by its terms only through May 4, 2004. Thus, when the Company made the unilateral change in June 2004, there was no agreement in effect with a management rights clause to privilege the Company's unilateral action. It is settled that such a contractual reservation of management rights does not survive the contract's expiration where, as here, the parties did not express a contrary intent.

The Company contends that it was entitled to make the unilateral change because, assertedly, the parties' last agreement renewed automatically for another year through May 4, 2005. Pointing to an evergreen clause in the agreement, which stated that it would self-renew from year to year absent timely written notice of a party's election to terminate the agreement, the Company notes that no such written notice was given here.

The Board, however, reasonably found that the agreement expired by its terms on May 4, 2004, and did not self-renew. It is undisputed that the parties commenced negotiations for a successor agreement in late 2003; those negotiations continued through at least April 2004. On those uncontested facts, the Board, relying on long-standing, settled precedent, reasonably found that by entering into negotiations for a new agreement, the parties waived the contractual requirement for timely or written notice of their intent not to let the old agreement roll over. Accordingly, when the Company altered employees' health insurance benefits on June 1, 2004, there was no agreement in effect with a management rights clause permitting that unilateral change. Therefore, the Board reasonably found that the Company violated Section 8(a)(5)and (1) of the Act by refusing to bargain with the Union over the change.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING THE EMPLOYEES' HEALTH INSURANCE BENEFITS

A. An Employer Must Bargain Over Mandatory Subjects, Such as Health Insurance Benefits, and May Not Unilaterally Change Existing Benefits after Contract Expiration, Absent Impasse

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representative of its employees " As defined in Section 8(d) of the Act (29 U.S.C. § 158(d)), collective bargaining is the mutual obligation of the employer and the union to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment " Bargaining is mandatory with respect to subjects that fall within that statutory language. NLRB v. Wooster Div. of Borg-Warner Corp., 365 U.S. 347, 349 (1958). It is settled that health insurance benefits are a mandatory subject of bargaining. Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 159 (1971); Firch Baking Company v. NLRB, 479 F.2d 732, 735 (2d Cir. 1973); NLRB v. Auto Fast Freight, Inc., 793 f.2d 1126, 1129 (9th Cir. 1986). Indeed, at no point in these proceedings has the Company disputed the basic principle that employee

health insurance benefits are a term and condition of employment, and therefore a mandatory bargaining subject.

Under Section 8(a)(5) and (1) of the Act, it is unlawful for an employer to unilaterally change an existing term and condition of employment without first bargaining in good faith to impasse with the union, for "it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962). *See also Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979) (unilateral action "detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that the union is powerless"). ²

Further, the rule against unilateral changes applies after the parties' collective-bargaining agreement has expired. *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991); accord NLRB v.Katz, 369 U.S. at 743; NLRB v. WPIX, *Inc.*, 906 F.2d 898, 901 (2d Cir. 1990). At that point, the employees' existing terms and conditions of employment—such as the Vytra Health Plan that the Company had provided to employees since 1995—remain in effect, not as contractual terms, but by operation of law. In those circumstances, "the obligation

² A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *Citizens Publishing and Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).

not to make unilateral changes is 'rooted not in the contract but in preservation of existing terms and conditions of employment" *Litton Financial Printing v. NLRB*, 501 U.S. at 206-07 (citation omitted); *accord Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *NLRB v. Katz*, 369 U.S. at 743.

The Supreme Court has repeatedly held that the courts "should 'recognize without hesitation the primary function and responsibility of the Board" in construing and applying the duty to bargain and the language of Section 8(d). Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979) (quoting NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 499 (1960)). "[T]he facts and complexities of the bargaining process are 'particularly amenable to the expertise of the Board as fact finder,' and 'few issues are . . . better suited to the expert experience of a Board [that] deals constantly with such problems." NLRB v. Plainville Ready-Mix Concrete Co., 44 F.3d 1320, 1326 (6th Cir. 1995) (quoting Bolton-Emerson, Inc. v. NLRB, 899 F.2d 104, 108 (1st Cir. 1990)).

The Board's findings of fact are conclusive when supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Co. v. NLRB*, 340 U.S. 474, 477, 478 (1951) (reviewing court must affirm findings supported by substantial evidence even if it would have reached a different conclusion had the matter been before it *de novo*); *NLRB v*.

Windsor Castle Health Care Facilities, 13 F.3d 619, 623 (2d Cir. 1994). The Court must affirm the Board's construction of the Act if it is "reasonably defensible." Ford Motor Co. v. NLRB, 441 U.S. at 497. See also Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 & n.11 (1984).

B. By Starting Negotiations for a New Agreement, the Parties Waived the Contractual Requirement for Written Notice of Termination; Accordingly, the Old Agreement Did Not Renew Automatically, and When It Expired, So Did the Company's Contractual Right to Make Unilateral Changes; Therefore, the Company's Post-Expiration Unilateral Change Was Unlawful

In this case, the Board found that on June 1, 2004, the Company—without bargaining with the Union—changed employees' health insurance benefits by unilaterally switching them from the Vytra Health Plan to a plan with different benefits, United Healthcare. (JA 204; 195-202.) The Company does not dispute making the change and refusing to bargain with the Union over it. Instead, the Company asserts (Br 23-24), as it did before the Board, that the parties' collective-bargaining agreement privileged its unilateral action. According to the Company (Br 13), the parties' most recent renewal agreement, which was effective by its terms from May 4, 2003, to May 4, 2004, automatically renewed for another year. In claiming yet another renewal, the Company (Br 23) points to the agreement's evergreen clause, which stated that the agreement would automatically renew from year to year absent timely written notice of a party's election to terminate the

agreement; it is undisputed that no such written notice was given in this case. (JA 55.)

The evergreen clause is crucial to the Company's argument because the 2003-2004 agreement incorporated by reference a management rights clause permitting the Company to make unilateral changes in health benefits.³ Thus, if, as the Company asserts (Br 13), the 2003-2004 agreement automatically renewed for another year—which it did not—the management rights clause in the renewed agreement would have privileged the Company's June 1, 2004, unilateral change to the United Healthcare plan.

The Board, however, reasonably found that the 2003-2004 agreement did not self-renew. (JA 235.) Rather, as the Board found, in late 2003, during the term of the 2003-2004 agreement, the parties began negotiations for a *new* collectivebargaining agreement; those negotiations continued through at least April 2004. The Company (Br 11) does not dispute those factual findings. On those uncontested facts, the Board—relying on a settled rule that it has applied in a line of cases that includes Ship Shape Maintenance Co., Inc., 187 NLRB 289, 291 (1970), Lou's Produce, Inc., 308 NLRB 1194, 1205 (1992), enf'd mem., 21 F.3d

³ As shown in the Statement of Facts, the 1998-2001 agreement, which was renewed annually through 2004, preserved "current practices, policies and procedures" set forth in the Company's Personnel Policies and Procedures Manual; the Manual in turn gave the Company the right in its sole discretion to modify or terminate employee benefits without the Union's consent. (JA 115, 154.)

1114 (9th Cir. 1994), and *Drew Div. of Ashland Chemical Co.*, 336 NLRB 477, 481 (2001)—found that by entering into negotiations for a successor agreement, the parties waived the contractual requirement of timely or written notice of their intent to terminate the old agreement. (JA 235.) Accordingly, the Board reasonably found that the 2003-2004 agreement did not automatically renew.

As the Board further found (JA 235), the provision that the 2003-2004 agreement incorporated by reference--reserving to the Company sole discretion over health insurance benefits--did not survive the expiration of that agreement on May 4, 2004. Thus, as the Board found (JA 235), when the 2003-2004 agreement expired by its terms in May 2004, so too did the contractual management rights clause that privileged unilateral changes in health insurance benefits. After all, as the Board explained (JA 235), "it is settled that a contractual reservation of management rights does not extend beyond the expiration of the contract absent the parties' contrary intentions." See, for example, Beverly Health and Rehabilitation Services, Inc. v. NLRB, 297 F.3d 468, 482 (6th Cir. 2002); Furniture Rentors of America v. NLRB, 36 F.3d 1240, 1245 (3d Cir. 1994); Blue Circle Cement Co., 319 NLRB 954, 954 (1995), enf'd mem., 106 F.3d 413 (10th Cir. 1997); Holiday Inn of Victorville, 284 NLRB 916, 916 (1987). As the Board found (JA 235), there is no evidence here that the parties intended to extend the management rights clause beyond the agreement term.

Accordingly, when the Company unilaterally switched employees from the Vytra Health Plan to United Healthcare on June 1, 2004, the parties' most recent collective-bargaining agreement had already expired, and there was no agreement in effect with a management rights clause to privilege that unilateral action. Therefore, the Board reasonably found (JA 235) that the Company's refusal to bargain with the Union over the change violated Section 8(a)(5) and (1) of the Act. *See* cases cited above p.8.

The Company (Br 11) concedes that the parties began negotiations for a new collective-bargaining agreement during the term of the 2003-2004 agreement.

Therefore, as the Company agrees (Br 4, 13), the key issue before the Court is whether the Board reasonably found that the parties, by admittedly commencing those negotiations in late 2003, effectively waived the requirement in the 2003-2004 agreement for timely or written notice of their intent not to let that agreement roll over. As we now show, ample, consistent precedent fully supports the Board's finding (JA 235) that by commencing negotiations for a new agreement in 2003, the parties did waive the requirement for a written termination notice.

Accordingly, the 2003-2004 agreement did not renew automatically, and there was no agreement in effect to privilege the Company's June 2004 unilateral action.

C. The Board Reasonably Applied Its Precedent In Holding that the Parties, by Entering into Negotiations for a New Agreement while the Old One Was in Effect, Waived the Contractual Requirement for Timely or Written Notice of Termination

As the Company acknowledges (Br 18), the Board has long recognized that parties' actions—even if they fall short of complying with a contractual requirement for timely or written notice of their intent to terminate a collective-bargaining agreement—can forestall automatic renewal. Thus, in *Ship Shape Maintenance Co., Inc.*, 187 NLRB 289, 291 (1970), which involved an automatic renewal provision similar to the one at issue here, the parties—as they did here—commenced negotiations for a new collective-bargaining agreement during the window period for serving a termination notice. The Board found that the employer, by its conduct, "waived the contractual requirement for a 60-day written notice," and therefore that the automatic renewal provisions in the old agreement were not triggered. *Id.* at 289-91. That is just what happened here.

Similarly, in *Allied Ind. Workers, Local 770 (Hutco Equip. Co.)*, 285 NLRB 651, 654 (1987), the union, like the parties in the instant case, agreed to a schedule of negotiating sessions for a new contract, and actually participated in bargaining while the parties' old agreement was in effect. After those negotiations were underway, the union asserted that the old agreement had already renewed automatically, because the employer had failed to timely serve a notice of intent to

renegotiate the old agreement. *Id.* The Board, however, found that by its conduct of participating in bargaining, the union "waived its right to object to the timeliness of the Employer's notice" *Id.* at 285 n.2, 654. This finding applies with equal force to the parties here. Likewise, in *Drew Div. of Ashland Chemical Co.*, 336 NLRB 477, 481 (2001), as in the instant case, the Board found that because the parties actually began bargaining for a new agreement before the old one had expired, they were deemed to have waived the contractual requirement that the notice of termination be in writing or that it be timely.

Contrary to the Company (Br 14), those cases are directly on point. It is undisputed that here, as in the cases cited above, the parties entered into bargaining for a new agreement while the existing agreement was still in effect, and that neither party complied with the contractual requirement for timely written notice of their intent not to let the existing agreement roll over. By commencing negotiations for a new agreement, the parties here, like the parties in the cases cited above, effectively indicated that they did not intend the expired contract to renew automatically.

The Company acknowledges (Br 18-19) the principle that by entering into negotiations for a new agreement, parties may waive contractual requirements for timely written notice. The Company, however, asserts (Br 18-20) that bargaining

alone—without attempting to provide some kind of written notice of termination, even an untimely one—will trigger automatic renewal.

The Company misstates the law. The cases on which the Board relied here do not impose a "bargaining-plus" requirement. Nor do the cases require parties to make some type of threshold attempt at providing untimely notice in order to avoid automatic renewal. Although several of the cases cited by the Board (JA 235) and the Company (Br 14-16) happen to involve untimely notice (see, e.g., Big Sky Locators, Inc., 344 NLRB No. 15 (2005), 2005 WL 389048*5-6, and Hassett Maintenance Corp., 260 NLRB 1211, 1213 n.3 (1982)), that fact is not crucial to their outcome. Rather, the key unifying theme in those cases is that waiver of a contractual requirement for written notice can occur through conduct—even if the parties do not comply with a contract clause's notice provision. The instant case involves precisely that situation: the parties, by their actions, which consisted of admittedly engaging in negotiations for a new agreement during the term of the existing agreement, placed each other on notice that they did not intend to let that agreement renew automatically.

Indeed, the cases cited by the Company support rather than undermine the Board's finding. Thus, in *Ship Shape Maintenance Co., Inc.*, 187 NLRB 289 (1970), the parties began bargaining before a notice of termination was required to be given, thereby indicating their willingness to waive the contractual notice

provision, just as occurred in the instant case. Similarly, in *Allied Ind. Workers*, *Local 770 (Hutco Equip. Co.)*, 285 NLRB 651, 654 (1987), the Board held that the union had waived the notice provision by entering into bargaining, even though the union claimed that the employer's notice of contract termination was untimely.

The Company even agrees (Br 18) that *Hutco* was properly decided; it apparently concedes that bargaining alone can suffice to waive a contractual notice requirement, as it argues (Br 19-20) that the union's participation in bargaining "was clearly contrary to its contention that the contract continued." That is true not only in *Hutco*, but in the instant case as well. The Company's failure to effectively explain why the instant case should have a different outcome than *Hutco* is fatal to its argument.

The Company also errs in asserting (Br 14-15) that *Lou's Produce, Inc.*, 308 NLRB 1194, 1194, 1200 n.4 (1992), *enf'd mem.*, 21 F.3d 1114 (9th Cir. 1994), on which the Board relied here (JA 235), is inapposite. Although the issue of automatic renewal arose in a somewhat different context in *Lou's Produce*, the operative principle remains applicable here. In *Lou's Produce*, *id.* at 1194, the Board was called upon to analyze an employer's claim that the union engaged in bad faith bargaining by stating during negotiations for a new agreement that the old one had automatically renewed. To resolve that question, the Board relied on the rule that it applied here—namely, that "if parties actually begin bargaining before

the contract expires, they will be deemed to have waived the requirement that the notice of termination be in writing or that it be timely." *Id.* at 1200 n.4. The Board found (and the Court agreed) that the union's declaration of automatic renewal did not constitute bad faith bargaining so as to privilege the employer's unilateral, post-contract expiration changes in health insurance and other employee benefits, because at the same time that the union was declaring that the old contract had rolled over, it was continuing to negotiate with the employer for a new agreement. *Id.* at 1194, *enf'd mem.*, 21 F.3d 1114.

Although the Company maintains (Br 14-15) that no similar actions were undertaken by the parties in the instant case, it is uncontested that the parties here did engage in bargaining for a new contract, just as the parties in *Lou's Produce* did. Accordingly, the result should be the same in both cases—here, as in *Lou's Produce*, the parties, by undertaking negotiations for a new agreement, waived the requirement for written notice of their intent not to let the old agreement automatically renew. In sum, *Lou's Produce*, like the other cases on which the Board relied here, demonstrates that the Board appropriately places more weight on the parties' actions at the bargaining table than on their statements regarding compliance with contractual notice provisions.

The Company's reliance (Br 21) on *Budd Electronics, Inc.*, 137 NLRB 498, 499-500 (1962), is unavailing. In *Budd*, unlike the instant case, the parties did not

commence bargaining to modify the timekeepers' agreement until *after* the agreement's term had already lapsed. In those very different circumstances, the Board found (*id.* at 501) that the parties had failed to give effective notice of their intent not to let the agreement roll over for another term. As the cases cited above, pp.15-18, make clear, in cases involving an evergreen clause like the one here and in *Budd*, waiver will occur only where, as here—but not in *Budd*—the parties begin negotiations for a new agreement before the old agreement is due to expire. Thus, the Board's reasoning in *Budd* is in accord with its reasoning here; the outcomes in the two cases differ only because the facts differ.

The Company's cause is also not aided by its reliance (Br 22) on *NKS*Distributors, Inc., 304 NLRB 338 (1991). That case has no precedential value because the Board later vacated its order in *NKS Distributors, Inc.*, 317 NLRB 1139, 1139 (1995). See Bridgestone/Firestone, Inc., 331 NLRB 205, 208 (2000). In any event, *NKS* has no bearing on the instant case because it involved the interplay between a re-opener clause and a termination clause. Interpreting the re-opener clause, the Board concluded that the provisions covered by that clause were effectively terminated, but that the remainder of the contract survived. *NKS Distributors*, 304 NLRB 338, 342-43 (1991). There is no such re-opener clause in the instant case.

The Company's other arguments are equally baseless. Thus, it asserts (Br 20) that the 1998-2001 agreement "expired." Not only is the Company incorrect—the evidence is uncontroverted that the 1998-2001 agreement automatically renewed for several years, through May 4, 2004—but its assertion undermines its central argument that a renewal agreement was in effect in May 2004, and that it rolled over to privilege the Company's June 2004 unilateral change in health insurance benefits.

The Company's further claim (Br 13-15)—that by entering into bargaining, the parties did not indicate that they wished the old contract to expire, but only that they wanted to enter into a new contract—is a non sequitur. The parties had already created a mechanism for automatically renewing the old contract; by entering into bargaining for a new contract in late 2003, they signaled their intent to renegotiate rather than roll over the old contract once again. Additionally, the Company misses the mark in arguing (Br 17) that its actions did not constitute a waiver of the requirement for a written termination notice because "there was no evidence presented concerning the breadth of negotiations." The scope of bargaining is irrelevant. The key point, as discussed above, is that the parties admittedly entered into bargaining for a new contract during the term of the old one, thereby waiving the requirement for a written termination notice.

In sum, the Company does not seriously dispute that if the 2003-2004 agreement did not automatically renew for another year, its unilaterally-implemented change from the Vytra Health Plan to United Healthcare was unlawful. Yet, that is precisely what occurred here, and for the reasons explained above, the Board's order should be enforced.

D. The Company Fails to Show that the Memorandum of Agreement Authorized It to Make Unilateral Changes to Employees' Health Insurance Benefits

The Company asserts (Br 12, 17) that the Memorandum Of Agreement entered into by the parties on April 22, 2004, extended the management rights clause of the 2003-2004 agreement, and thus authorized the Company to make unilateral changes to the employees' health insurance benefit in June 2004.

Simply put, this claim is wrong. The Memorandum (JA 160-187) on its face establishes that it was effective "through May 4, 2004." (JA 172, 187.) Thus, the Memorandum was coextensive with the remaining term of the existing 2003-2004 agreement. Rather than constituting a successor agreement, the Memorandum was at most only a document that cleaned up and partially modified retroactively certain terms of the then-current and past agreements. (JA 159.)

The Company misses the mark in asserting (Br 6-7) that the Board erred in noting (JA 204) that the Memorandum was retroactive. Regardless of whether it was retroactive to May 4, 2001, the Memorandum expired by its terms on May 4,

2004, as the Company appears to concede (Br 7). The scope of the Memorandum's applicability prior to its expiration is irrelevant to actions taken by the Company more than a month later.

The Company also misses the mark by insisting (Br 12) that because the Company did not ratify the Memorandum until June 28, it somehow was still effective when the Company unilaterally changed the employees' health insurance benefits on June 1. However, the belated ratification does not alter the Memorandum's explicit duration. As noted above, the Memorandum expired by its terms on May 4, 2004.

In sum, despite the Company's arguments, the black-and-white truth of the matter is that the Memorandum was not in effect in June 2004, and therefore could not have authorized the Company to unilaterally implement changes to employee health insurance benefits. Accordingly, the Court should uphold the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally altering those benefits.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's order in full.

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March 2006

H:\Long Island Head Start-Final Brief-jbjh

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

| LONG ISLAND HEAD START CHILD | |
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| DEVELOPMENT SERVICES |) |
| Petitioner/Cross-Respondent |)) |
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| NATIONAL LABOR RELATIONS BOARD |)) |
| Respondent/Cross-Petitioner |) |

COMBINED CERTIFICATES

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel make the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 5,516 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Board counsel certifies that the contents of the .pdf file containing a copy of the Board's brief that was sent by e-mail to the Court and counsel are identical to the hard copy of the Board's brief filed with the Court and served on counsel, and were scanned for viruses using Symantec Antivirus Corporate Edition, program version 8.00.9374 (12/9/2004 rev. 25), and according to that program, were free of viruses.

Aileen A. Armstrong Deputy Associate General Counsel National Labor Relations Board 1099 14th Street, NW Washington, DC 20570

Dated at Washington, DC this 13th day of March 2006

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's brief have this day been served by first-class mail upon the following counsel at the address listed below, and that, as required by Local Rule 32, a copy of the brief in .pdf form has been served by email on the following counsel:

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Dated at Washington, DC this 13th day of March 2006